IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.10.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

C.R.P.(NPD) No.1024 of 2003

1.Salem Vivekananda English
Institute
Central Commercial Complex
Opposite to GH
Salem-636001.

2.Mrs.S.Ramajanardhani

3.Thambi V.Sivaramasubramaniam .. Petitioners/Defendants 1 to 3

vs.

1.Vivekananda Kalvi Nilayam Pvt.
Ltd.
9, Madley Road, T.Nagar
Chennai.600 017, rep. by
Mr.V.Rajagopalan.

2.S.Varadarajan .. Respondents/Plaintiff & 4th defendant

Revision Petition filed against the order dated 6.2.2003, on the file of the Principal District Judge, Salem in unnumbered suit No. of 2002.

For Petitioners : Mr.A.Sivaji
For Respondents : Mr.Mr.S.Kuberan, for M/s.Rank Associates.

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ORDER:

This Revision Petition has been filed against the order dated 6.2.2003 on the file of the Principal District Judge, Salem in unnumbered suit No. of 2002.

2. Defendants 1 to 3 before the Principal District Judge, Salem are the revision petitioners before this court.

3. The 1st respondent herein as plaintiff filed O.S.No.1228/1999

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on the file of the III Asst. City Civil Court, Chennai. The case of the 1st respondent/plaintiff is that they provide courses for spoken English, learning English etc. under the brand name Vivekananda Institute for more than 18 years. On application from the 2nd revision petitioner herein to run the institute at Salem, using the brand name, study materials and other materials were given to the 2nd revision petitioner by the 1st respondent/plaintiff on certain terms and conditions. Though franchise was given in the name of the 2nd revision petitioner, the 3rd revision petitioner and the 2nd respondent together with the 2nd revision petitioner were operating the institute. On 28.9.1998, the 2nd revision petitioner sent a letter to relinquish her franchise and the same was accepted by 1st respondent/plaintiff requesting her to return all the materials. Without returning the materials, the revision petitioners 2 and 3 and the 2nd respondent herein started another institute by name Salem Vivekananda English Institute at the same premises and they are using 1st respondent/plaintiff's materials also. Therefore the 1st respondent/plaintiff filed O.S.No.1228/1999 for the following reliefs namely,

> "(a) for the sum of Rs.84,079/- with interest at the rate of 24% p.a.
> (b) for damages of Rs.25,000/- or at amount fixed by the Court;
> (c) return of study and others;
>
> (d) For permanent injunction restraining the defendants, their men .... from carrying on the business under the name and style of Salem Vivekananda English Institute."

4. Before the 3rd Assistant City Civil Court, Chennai, the revision petitioners raised the point of maintainability on the ground that the suit is based on passing off action and infringement and Trade Mark and therefore the suit ought to have been filed before the additional court only. By order dated 8.3.1999 the 3rd Assistant City Civil Judge accepted the contentions of the revision petitioners and ordered the return of the plaint to be presented before the appropriate court. Against that order, the 1st respondent/plaintiff filed C.M.A.No.67/1999 and the appellate court after finding that there is no infringement of registered Trade Mark to file the suit under Sec.105 of Trade and Merchandise Marks Act, 1958, set aside the order of the trial court and directed the court to take the suit on file and to proceed with the same.

5. The revision petitioners filed Tr.C.M.P.Nos.14141 and 14142 of 2000 before this court to transfer the suit to a competent court at Salem on the ground that no part of cause of action arose within the jurisdiction City Civil Court, Chennai and by order dated 7.11.2001,

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this court transferred the suit to the court of Principal District Judge, Salem.

6. In the order dated 7.11.2001, the High Court observed that the reliefs (a) and (b) prayed in the plaint relate to recovery of money and (c) relates to return of materials and the relief (d) relates to permanent injunction restraining the defendants from using the name of Salem Vivekananda English Institute and that relief sought for cannot be clubbed in a single suit. The High Court directed the Principal District Court, Salem to seek clarification from the plaintiff for the maintainability of the same and decide the issue of maintainability.

7. By order dated 6.2.2003 the Principal District Judge, Salem held that the relief (d) in the plaint is also a relief for which common law remedy is available and directed that the suit is to be numbered and then be transferred to the Principal Sub-Court, Salem for disposal.

8. Aggrieved by order dated 6.2.2003, defendants 1 to 3 in O.S.No.1228/1999, which is not yet numbered in the Sub-Court, Salem, filed the above Civil Revision Petition under Sec.115 of CPC.

9. Heard both the learned counsel appearing on either side and I have also gone through the documents filed in support of their submissions.

10. The only point that arises for consideration in this Revision Petition is whether Sec.105 of Trade and Merchandise Act, 1958 would apply to the suit as filed in the III Asst. City Civil Court, Chennai (which is now transferred to Principal Sub-Court, Salem) is maintainable before that Court.

11. Learned counsel for the revision petitioners submitted that in view of Sec.105 of the Trade and Merchandise Act, no suit containing the prayer as prayed by the 1st respondent/plaintiff for relief (d) in the plaint shall be instituted in any court inferior to District Court and therefore the order dated 6.2.2003 is wrong in holding that the suit for passing off can also be filed before any court inferior to the District Court.

12. Per contra, learned counsel for 1st respondent/plaintiff has supported the order dated 6.2.2003 and prayed for dismissal of the revision petition.

13. Insofar as relief (d) in the plaint is concerned, it is for permanent injunction restraining the defendants from using the name Salem Vivekananda English Institute and thus it is a relief which is based on passing off. As rightly held by the Principal District Judge, Salem, the action of passing off from representing the business

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or running the institute as that of the plaintiff for which remedy available is only under the common law.

14. The question before the trial court is whether by running the institute under the name and style of Salem Vivekananda English Institute, the defendants are guilty of false representation and deception.

15. The action for passing off is a common law remedy being in substance, an action for deceit, that is, a passing off of a person of his own goods as those of another.

16. It is also not the case of the 1st respondent/plaintiff that there is any infringement of Trade Mark and in fact there is no registration of any Trade Mark neither pleaded nor stated by 1st respondent/plaintiff and in such circumstances, Sec.105 of Trade Mark and Merchandise Act, would not apply.

17. It is true that this question was already raised before the III Asst. City Civil Court, Chennai and the appellate Court held the issue in favour of the 1st respondent/plaintiff and the order of the appellate court has become final.

18. The learned counsel for the revision petitioners submitted that even though the question of maintainability has become final in C.M.A.No.67/1999, the High Court in its order dated 7.11.2001 in Tr.C.M.P.Nos.14141 and 14142 of 2000 directed the Principal District Judge, Salem to decide the issue of maintainability and therefore not challenging the order in C.M.A.No.67/1999 cannot be held against the revision petitioners.

19. It is true that the question of maintainability is left open by this court in the transfer petition. But the Principal District Judge, Salem has gone into the matter elaborately and considered the facts on merits to conclude that the suit as filed with the reliefs as prayed in the plaint in (a) to (d) is maintainable. I do not find any infirmity nor illegality in the order of the District Court Salem dated 6.2.2003 warranting interference by this court under Sec.115 of CPC.

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20. Hence the C.R.P. is dismissed. No costs. C.M.P.Nos.6758/2003 and 8125/2005 are also dismissed.

30.10.2006

ORDER: This Petition having been coming on Wednesday, the 22nd day of November 2006 for 'Orders' in the presence of the abovesaid Advocates, the Court made the following order:-

At the time of pronouncing the orders, the learned counsel for the petitioners submitted that in February 2005 itself the 1st respondent has stopped using the name 'Vivekananda Kalvi Nilayam' and it was changed to VETA and in view of this, the 1st respondent has lost interest in its original name and therefore the suit in O.S.No.133/2003 on the file of the Principal District Judge, Salem itself is to be dismissed.

2. Insofar as this C.R.P. is concerned, the revision petition is against the order of the Principal District Judge, Salem holding that the relief 'd' prayed in the plaint is also a relief for which common law remedy is available and directed numbering of the suit and transferred to the Principal Sub-Court, Salem for disposal. The said suit is numbered as O.S.No.133/2003.

3. In view of the subsequent development namely, the 1st respondent/plaintiff themselves changed the name, they cannot maintain the relief 'd' for permanent injunction restraining the defendants from carrying on business under the name and style of 'Salem Vivekananda English Institute'.

4. As rightly pointed out by the learned counsel for the 1st respondent/plaintiff, the suit in entirety cannot be dismissed as the 1st respondent/plaintiff has got every right to proceed with the suit for the relief 'a','b' and 'c'. Therefore the relief of permanent injunction as sought for in O.S.No.133/2003 on the file of the Principal Sub-Court, Salem is alone dismissed as unnecessary in view of the subsequent development and the suit is to be proceeded with, with regard to other reliefs.

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5. With this modification, the Civil Revision Petition is ordered accordingly.

sks

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. The Principal District Judge, Salem.
(with records if any)

2. The Record Keeper, VR Section, High Court, Madras.

1 CC TO M/S RANK ASSOCIATES, ADVOCATE SR 51262

Pre-delivery order,
C.R.P.(NPD)1024/03.

22.11.2006

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